

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

PHL VARIABLE INSURANCE CO.,
Plaintiff,
v.
THE ABRAMS FAMILY IRREVOCABLE
LIFE INSURANCE TRUST,
Defendant.

Case No. 10cv521 BTM (POR)

**ORDER DENYING MOTION TO
DISMISS AS MOOT**

Defendant filed a motion to dismiss the Complaint for failure to plead fraud with particularity and for failure to plead the elements of negligent misrepresentation [Doc. 5]. Since Defendant filed its motion, Plaintiff filed an opposition to the motion and an Amended Complaint. Plaintiff did not seek leave of the Court to file the Amended Complaint, believing that leave was unnecessary because Defendant had not filed a responsive pleading.¹ Although Federal Rule of Civil Procedure permits one amendment without leave, that is only the case when a plaintiff amends within twenty-one days after service of a motion to dismiss. See Fed. R. Civ. P. 15(a)(1)(B). Plaintiff tried to amend its Complaint past the twenty-one day deadline.²

Still, rather than strike the Amended Complaint from the docket and direct Plaintiff to

¹ Plaintiff cites to cases interpreting a previous version of Rule 15. The current version only permits amendment without leave within twenty-one days after a responsive pleading or within twenty-one days of service of a motion under Rule 12(b), (e), or (f). Fed. R. Civ. P. 15(a)(1)(B).

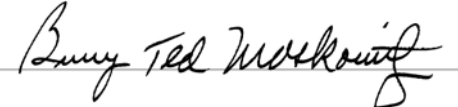
² Defendant filed its motion to dismiss on May 24, 2010, and Plaintiff filed its Amended Complaint on June 25, 2010. Yet Plaintiff inexplicably says that it filed its Amended Complaint within twenty-one days after service of Defendant's motion to dismiss. Based on the docket entries, Plaintiff is mistaken.

1 ask for leave, the Court construes Plaintiff's response in opposition to the motion to dismiss
2 as a request for leave to amend. The Court **GRANTS** the request for leave to amend and
3 gives Defendant twenty-one days from the filing of this order to respond to the Amended
4 Complaint. The Court **DENIES** the motion to dismiss as moot [Doc. 5].

5 The Court advises Plaintiff to comply with the federal and local rules in the future.

6 **IT IS SO ORDERED.**

7 DATED: July 9, 2010

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10 Honorable Barry Ted Moskowitz
11 United States District Judge
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